

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MYRON DEWAYNE SMITH,

Defendant-Appellant.

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UNPUBLISHED

November 16, 2006

No. 264231

Wayne Circuit Court

LC No. 05-002851-01

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of attempted breaking and entering a building with the intent to commit larceny, MCL 750.110; MCL 750.92. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to a term of four to ten years' imprisonment for the conviction. We affirm defendant's conviction, vacate his sentence and remand for resentencing and correction of his presentence report.

Defendant first argues that he was denied his constitutional right to due process and a fair trial because the prosecutor and the police failed to thoroughly investigate the crime scene. We disagree.

Because defendant failed to properly preserve this issue below, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The prosecutor is not under an affirmative duty to search for evidence to aid the defendant's case. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995). "Although the prosecution bears the burden of proving guilt beyond a reasonable doubt in a criminal trial, it need not negate every theory consistent with defendant's innocence, nor exhaust all scientific means at its disposal." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003) (internal citations omitted). Similarly, the police are not under a duty to seek and discover exculpatory evidence. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997). Unless a criminal defendant can show bad faith on the part of the police or prosecutor, failure to preserve evidence does not constitute a denial of due process. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

In the present case, we conclude that defendant was not denied his right to due process and a fair trial. Contrary to defendant's argument, the police and prosecutor did not have a duty to complete fingerprint testing, take photographs of the scene or search for footprints of an

alleged perpetrator. Furthermore, a review of the lower court record shows that the evidence presented at trial was sufficient to support defendant's conviction. Accordingly, defendant has failed to develop a valid claim of a constitutional violation arising from the alleged failure to investigate. See *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (noting that a defendant cannot leave it to this Court to search for a factual basis to sustain or reject his position). Therefore, we conclude that defendant is not entitled to relief on this basis.

Defendant next argues that the trial court erred in failing to give the "mere presence" jury instruction. We disagree.

Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination regarding whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). This Court reviews jury instructions as a whole to determine whether the trial court committed error requiring reversal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

A criminal defendant has the right to have a properly instructed jury. *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). "[J]ury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000) (citation omitted). This Court has found that "the failure to give a requested instruction is error requiring reversal only if the requested instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense." *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995). If an applicable instruction was not given, the defendant must show that the failure to give the requested instruction resulted in a miscarriage of justice; i.e., that it appears more likely than not that the error was outcome determinative. *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

The standard "mere presence" jury instruction provides as follows:

Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he/she] was present when it was committed is not enough to prove that [he/she] assisted in committing it. [CJI2d 8.5.]

CJI2d 8.5 is an aiding and abetting instruction. "An aiding and abetting instruction is proper where there is evidence that (1) more than one person was involved in the commission of a crime, and (2) the defendant's role in the crime may have been less than direct participation." *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995). This "mere presence" instruction applies where a person assists in the commission of a crime.<sup>1</sup>

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<sup>1</sup> This assistance may be more passive in some kinds of cases. For example, in cases involving drug houses, the "mere presence" instruction may be appropriate for persons present in a house where drugs are found, "on the theory that, even if the drugs and paraphernalia belonged to (continued...)

The record in the present case shows that defendant was only charged as a principal of the crime. Further, the record reveals that defendant's theory of the case was that he did not intend to assist in the crime because he merely watched from behind a wall. Defendant was not charged with being an aider and abettor, and defendant failed to show that he aided the unidentified individual. The instruction on mere presence was not supported by the evidence, and the trial court correctly denied defendant's request for the instruction.

Furthermore, when the jury instructions are taken as a whole, the instructions sufficiently protected defendant's rights. The instructions did not impair the defendant's ability to present the defense offered; i.e., that defendant had no connection to the alleged crime. Finally, even if the trial court erred in failing to give the instruction, defendant has failed to show that it is more likely than not that the error was outcome determinative in light of the overwhelming evidence presented by the prosecutor. *Riddle, supra* at 124-125. Accordingly, we conclude that defendant is not entitled to relief on this basis.

Defendant next argues that the trial court erred in scoring offense variable (OV) 16 because there was no evidence presented at trial regarding the amount of damage done to the building. We agree.

Because defendant failed to preserve this issue below, we review for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *Carines, supra* at 763-764. To avoid forfeiture under the plain error rule, a defendant must show that: (1) there was an error; (2) the error was plain; i.e., clear or obvious; and (3) the error impacted substantial rights by affecting the outcome of the proceedings. *Id.* Reversal is then warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.*

OV 16 requires the trial court to assess five points for property damage where "[t]he property had a value of \$1,000.00 or more but not more than \$20,000.00." MCL 777.46(1)(c). Both parties agree on appeal that it was not established that the property damaged in the instant case had an aggregate value of \$1,000 or more; as the prosecutor states in its brief on appeal, "[b]ecause there is no evidence in support of the amount of damage done, OV 16 should have been scored at zero." Because there was no evidence to support a score of five points for OV 16, we conclude that plain or clear error occurred. We vacate defendant's sentence and direct the trial court on remand to score OV 16 at zero points, reducing defendant's total OV score to five points, and reducing his minimum sentence range from 12 to 48 months to 9 to 46 months.<sup>2</sup> MCL 777.21(3)(c); MCL 777.67. *Kimble, supra* at 312. Additionally, the presentence report must be amended to include the amount of damage done to the property and the trial court should

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(...continued)

someone else, defendant assisted that person by providing a storage place for them." *Head, supra*.

<sup>2</sup> We note that MCL 777.46 directs the trial court to score one point for OV 16 if "the property had a value of \$200.00 or more but not more than \$1000.00," and zero points if the property had a value of less than \$200. Either zero or one point for OV 16 would still give defendant a minimum guidelines range of 9 to 46 months.

“use the monetary amount appropriate to restore the property to pre-offense condition” in determining the value of the damaged property. MCL 777.46(2)(b).

Defendant also raises a claim of ineffective assistance of counsel based on defense counsel’s failure to object to the trial court’s score of OV 16. However, in light of our foregoing conclusion, we decline to address the issue on appeal.

Defendant next argues that his sentence was improper based on the United States Supreme Court holding in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the trial court sentenced him based on facts that were not proved to the jury beyond a reasonable doubt. However, in *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), our Supreme Court recently held that *Blakely* does not apply to Michigan’s indeterminate sentencing structure. Accordingly, defendant’s argument is without merit. Furthermore, we reject defendant’s claim that defense counsel was ineffective for failing to object on this basis. Any objection to the trial court based on *Blakely* would have failed. Defense counsel is not ineffective for failing to make a meritless motion or a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Accordingly, we decline to grant defendant relief based on this claim of ineffective assistance of counsel.

Finally, defendant argues that his presentence report should be corrected to reflect that he was convicted of the instant charge by a jury rather than by a plea. The prosecution has expressly declined to contest defendant’s request for correction of his presentence report. At sentencing, the trial court indicated that it had found multiple errors on the face of the presentence report, including the fact that it indicated that defendant pleaded to the instant charge rather than being convicted by a jury. Generally, if the trial court finds that the information in the presentence report is inaccurate or irrelevant, it must strike that information from the presentence report before sending the report to the Department of Corrections. MCL 771.14(6); MCR 6.425(D)(3); *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). Defendant has established on appeal that the trial court did not strike the information from the presentence report before sending the report to the Department of Corrections. We remand to the trial court for the purpose of correcting defendant’s presentence report to reflect that a jury convicted him of the instant offense.

Affirmed in part, vacated in part and remanded for resentencing and correction of defendant’s presentence report consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper  
/s/ Joel P. Hoekstra  
/s/ Michael R. Smolenski